STATEMENT OF

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BEFORE THE

UNITED STATES SENATE

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U.S. ACCESSION TO THE LAW OF THE SEA CONVENTION

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Mr. Chairman and members of the Committee, it is an honor for me to discuss the Law of the Sea (LOS) Convention and the need for the United States, as the Convention's primary author and proponent, to take a leadership position in joining 145 other parties in a stable legal framework for the oceans.

The Convention and the fundamental changes from the 1994 Agreement constitute a huge success for the U.S. Today's military operations - from Operation Enduring Freedom to Operation Iraqi Freedom to the Global War on Terrorism - place a premium on the Navy's strategic mobility and operational maneuverability. The Convention enhances access and transit rights for our ships, aircraft, and submarines, and reinforces the nation's ability to conduct these operations.

The critics of the Convention fail to understand, or even acknowledge, that since President Reagan's 1983 ocean policy statement, we have conducted and continue to conduct all of our operations in accordance with the LOS Convention.

The U.S. Navy puts the Convention to the test numerous times each day around the world. I ask you to give more credence to our men and women who go in harm's way than to the theories of the naysayers. Every time a U.S. submarine makes a submerged transit of the Strait of Gibraltar and every time a U.S. aircraft carrier transits the Strait of Hormuz with its planes and helicopters flying, the Convention is used and validated. From the national security standpoint we got everything we needed. We will never get as favorable of an international agreement on navigational rights again. We cannot avoid a multilateral approach when it comes to determining rules for maritime areas where no one nation has sole jurisdiction. The issue is not whether the LOS Convention provisions are adequate, but whether we can keep them in place in the face of increasing coastal state pressure. The best of all options would be to freeze them in their current form. We cannot continue to rely on customary international law for our navigation rights and freedoms. In November, the Convention will be open to amendment and possible change. The United States should accede to the Convention immediately as a means to assure access to the oceans and take a leading role in the future developments in the law to ensure they continue to further our national security interests.

The United States' interests as a global maritime nation were a prime impetus for the negotiations of the Convention from 1973 to 1982, as well as later to obtain changes to the deep seabed mining provisions to which President Reagan

correctly objected. President Reagan did not reject to the Convention in its entirety as has been misstated by the naysayers. In fact his Oceans Policy Statement of 1983 required that the U.S. operate consistent with the Convention's provisions except for deep seabed mining. Experienced, career military officers were integral members of the U.S. delegations during the negotiations, which were hugely successful in securing and protecting all navigational rights necessary for our naval and air forces. Then, due to the hard work of successive administrations, the U.S. was also able to obtain necessary changes to the deep seabed mining provisions to address all of the concerns raised by President Reagan.

Let me put this in proper perspective to better understand what is really at issue by quoting from President Reagan's Deputy Secretary of State, Mr. John Whitehead, from his op/ed piece in the Washington Times of July 28, 1994: "One cannot dispute the reminiscence that 'some of us in the Reagan administration thought we had slain it for good.' But that was personal, not administration policy. The fact is that the Reagan White House and State Department never questioned the need for international law to codify a 12-mile limit to coastal sovereignty, naval rights of passage, prohibitions on maritime pollution and protections of fisheries. All of these advance interests important to Americans."

"The administration objected, very specifically and strenuously, to the section of the treaty establishing an international seabed mining authority that

would have subjected American mining companies to onerous controls dictated by a Third World majority. It singled out these provisions as 'not acceptable,' but insisted that if they were satisfactorily revised, 'The Administration will support ratification.'"

Mr. Whitehead concluded: "Immediately after the U.N. General Assembly promulgates the new agreement this week, all the major industrialized countries will sign the convention. It is vital for America's interests that we are among them. We have no need to fear prudent use and protection of the world's oceans and seas under rule of law."

Nonetheless, we continue to hear that the Part XI seabed mining provisions were not fixed because the 1994 Agreement is not an amendment to the LOS Convention. But, just read the text of the 1994 Agreement. It says, and I quote, "The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail." It is clear that the fundamental fixes made by the 1994 Agreement are legally binding. That is the conclusion of all the living, former Legal Advisers to the State Department reflected in the attached letter.

A specific issue in this area that continues to be wrongly stated is that the U.S. will be subject to mandatory requirements for transfer of technology. In

regard to the LOS Convention's technology transfer provisions found in Annex III, article 5, the 1994 Agreement provides, and again, I quote, "The provisions of Annex III, article 5, of the Convention shall not apply." Even such plain language is not good enough for some critics, who even though they begrudgingly acknowledge what the words say, have in the next breadth complained that you cannot believe the words. I cannot conceive of any treaty that could satisfy such criticism.

I would submit that it is totally inaccurate to state that the Convention subjects U.S. military or economic activities to the control of a UN bureaucracy. This is not true with respect to either military or economic or any other activities. Under the Convention all activities at sea, with the exception of deep seabed mining, are controlled by either the flag state (or sponsoring nation) or the coastal nation. The most important living and nonliving resources, including oil and gas, are under exclusive coastal nation control. The Seabed Authority's role is very carefully circumscribed and limited to coordinating the exploration and exploitation of the seabeds that are not under exclusive coastal nation control.

Despite its benefits, the Convention continues to be criticized because of the erroneous belief that the Convention will adversely affect U.S. sovereignty, inhibit our military operations including submarine and intelligence gathering activities, and hamper the President's Proliferation Security Initiative. These criticisms could

not be further from the truth. On the contrary, the Convention protects our sovereignty by recognizing our 12 nautical mile (nm) territorial sea and granting us sovereign rights in a 200 nm exclusive economic zone. The Convention also reaffirms the long-standing customary law norm of sovereign immunity for our warships.

Concerning submarine navigation and intelligence activities, nothing in the Convention will affect the way we currently conduct surveillance and intelligence activities at sea. Opponents to the Convention argue that the Convention's provisions on innocent passage will prohibit or otherwise adversely affect U.S. intelligence activities in foreign territorial seas at a time when such activity is vital to our national security. I can say without hesitation that nothing could be further from the truth.

Although the Convention recognizes the right of innocent passage and what activities constitute innocent passage in the territorial sea, the Convention imposes no obligation on parties to refrain from activities, such as intelligence gathering, that do not qualify for the right of innocent passage. Thus, Article 20 of the Convention merely states what a submarine must do to qualify for innocent passage in the territorial sea. This article merely repeats the rule concerning submerged transits from the 1958 Convention on the Territorial Sea, a convention to which the U.S. is a party. This rule has been the consistent position of nations,

including the United States, for more than 70 years and it has never been interpreted as prohibiting or otherwise restricting intelligence collection activities or submerged transits in the territorial sea for purposes other than innocent passage. In short, if or when the need arises to collect intelligence in a foreign territorial sea, it will be business as usual for the Navy and nothing in the LOS Convention will prohibit that activity.

In fact, from a navigational rights standpoint, the LOS Convention is more helpful than the 1958 Conventions to which the United States is currently a party. Submarines gain the right of submerged passage through international straits overlapped by territorial seas. More than 135 straits are affected, including strategically critical straits like Gibraltar, Hormuz and Malacca. The LOS Convention guarantees our armed forces a non-suspendable right of transit passage in, over and under these straits in the "normal mode" of operation. The same guaranteed, non-suspendable rights apply to warships, military aircraft and submarines transiting through archipelagoes, such as Indonesia and the Philippines. That means that our submarines can transit submerged, military aircraft can overfly in combat formation with normal equipment operation, and warships can transit in a manner necessary for their security, including launching and recovering aircraft, formation steaming and other force protection measures. Transit passage and archipelagic sea lanes passage are both creatures of the Convention. Without

question, accession to the LOS Convention will enhance U.S. national security and economic interests by solidifying these and other critical navigational rights and freedoms. Military planners have long sought international respect for the freedoms of navigation and over-flight that are set forth in the LOS Convention.

The Convention guarantees our right to exercise high seas freedoms of navigation and overflight and all other internationally lawful uses of the seas related to those freedoms within the exclusive economic zones (EEZ) of other nations. This includes the right to engage in military activities, such as:

- launching and recovery of aircraft, water-borne craft and other military devices;
- operating military devices;
- intelligence collection;
- surveillance and reconnaissance activities;
- military exercises and operations;
- conducting hydrographic surveys; and
- conducting military surveys (military marine data collection).

By codifying these important navigational rights and freedoms, the Convention provides international recognition of essential maritime mobility rights used by our forces on a daily basis around the globe. It establishes a legal framework for the behavior of its 145 parties and provides the legal predicate that

enables our armed forces to respond to crises expeditiously and at minimal diplomatic and political costs. Today, more than ever, it is essential that key sea and air lanes remain open as an international legal right, and not be contingent upon approval by nations along the route. Anything that might inhibit these inherent freedoms is something we must avoid. The stable legal regime for the world's oceans codified in the LOS Convention will guarantee the legal basis for the global mobility needed by our armed forces. And I might add that the navigational provisions of the Convention must continue to be exercised by our operational forces, particularly in the maritime environment of the global commons, an environment that has traditionally been one of claim and counterclaim.

Maritime Intercept Operations (MIO) and Proliferation Security Initiative (PSI)

The U.S. has conducted maritime intercept operations (MIO) and MIO-type operations since we first declared our independence and the LOS Convention will not have any adverse impact to continuing those activities. The U.S. has conducted these operations under a variety of legal bases that are consistent with customary international law and our treaty obligations as a party to the 1958 Geneva Conventions. The provisions of the 1958 Geneva Conventions are mirrored in the LOS Convention.

The LOS Convention also will not prohibit or impede the President's Proliferation Security Initiative (PSI). The Statement of Interdiction Principles for PSI explicitly states that interdiction activities under PSI will be taken "consistent with national legal authorities and relevant international law and frameworks." This includes the LOS Convention. Further, all of the U.S. partners to PSI are parties to the LOS Convention. The bottom line is that the Convention provides a solid legal basis for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of WMD, including: exclusive port and coastal state jurisdiction in internal waters, territorial seas and national airspace; coastal state jurisdiction in the 24 nm contiguous zone; flag state jurisdiction over its vessels on the high seas; and universal jurisdiction over stateless vessels. Ultimately, the U.S. always has the right to exercise self-defense, unaffected by the LOS Convention. The Convention's preamble is quite clear in this regard – that is, "matters not regulated by the Convention continue to be governed by the rules and principles of general international law." Thus, matters such as self defense under the UN Charter and belligerent rights under the law of armed conflict are unaffected by the Convention. In short, nothing in the LOS Convention hampers, impedes, trumps, or otherwise interferes with anything we have done in the past, present, or future regarding Maritime Intercept Operations or Proliferation Security Initiatives.

The navigation and overflight provisions of the LOS Convention support U.S. efforts in the war on terrorism by allowing our Armed Forces to get to the fight rapidly and with maximum maneuverability. The Department of Defense, Joint Chiefs of Staff, and the Navy have for years consistently supported the navigational provisions of the Convention. The combined weight of the knowledge and experience of the Chiefs of Naval Operations (CNOs) consistently supporting the navigational provisions of the LOS Convention ought not be dismissed derisively as some so-called defense experts have done. Those esteemed naval officers have been on the front lines and understand how vital the navigational provisions of the Convention are to our Armed Forces, now and in the future. Following the fixes in the 1994 Agreement to address the Reagan Administration's objections to the deep seabed mining provisions, there is no longer a valid reason to not move forward on U.S. accession. In fact, in 1998 all living former CNOs endorsed the LOS Convention and urged Senate leadership to take positive action on U.S. accession. A copy of their letter is attached.

Despite claims of critics, the Treaty does not give the United Nations authority to levy taxes. The LOS Convention does not authorize taxation of individuals or corporations. There are some limited revenue provisions for deep seabed mining operations and for oil and gas activities on the continental shelf beyond 200 miles. However, under the terms of the LOS Convention none of the

revenues from oil and gas activities on the continental shelf go to the United Nations or are subject to its control.

Another shibboleth being spread about the LOS Convention is that it will subject our military activities to some sort of world court to settle disputes. Again, this is absolutely wrong and misleading. With respect to the dispute settlement provisions of the LOS Convention, the Convention does establish the International Tribunal for the Law of the Sea (ITLOS). However, the Convention also permits parties to choose other methods of dispute settlement. The U.S. has indicated it will elect two forms of arbitration rather than the Tribunal. Further, the Convention permits parties to exclude from dispute settlement certain types of actions such as military activities. Thus, the U.S. declaration opting out of dispute settlement for military activities is consistent with the Convention and disputes concerning military activities would not be subject to dispute settlement under the Convention. What constitutes a U.S. military activity is a matter solely for the U.S. to determine. This recognizes that no country would subordinate its national security activities to an international tribunal. This was a point that everyone understood during the negotiations of the Convention. And that is why Article 286 of the Convention makes clear that the application of the compulsory dispute resolution procedures of Section 2 of Part XV are subject to the provisions of Section 3 of Part XV, which includes the provision that allows for military

exemptions. This exemption would clearly include military activities conducted pursuant to PSI, MIO or intelligence operations.

Future threats are likely to emerge in places and in ways that are not known. In order to be prepared to handle these challenges, the U.S. must be able to take maximum advantage of the navigational freedoms that the Convention codifies in order to get the armed forces to the fight rapidly. As the current Chief of Naval Operations has said, "When sailors are sent out on dangerous missions around the world, they want assurance that they are supported, not only by military force, but that they have the full backing of the law. We owe that to them."

Some have argued that joining the Convention is not necessary because the navigational rights and freedoms codified in the Convention already exist as customary international law and are therefore binding on all nations. That premise is flawed for a number of reasons.

While it is true that many of the Convention's provisions are reflective of customary international law, others, such as the rights of transit passage and archipelagic sea lanes passage that I previously discussed, are creations of the Convention. Additionally, if you examine the evolution of customary international law in the 20th Century, you'll find that it involved the erosion, not the preservation, of navigational rights and freedoms. The major maritime powers concluded in the mid-1950s that the best way to stop that erosion was through the

adoption of a universally recognized treaty that established limits on coastal nation jurisdiction and preserved traditional navigational rights and freedoms.

It is also important to note that not everyone agreed with our "customary international law" interpretation announced by President Reagan in his 1983 Ocean Policy Statement. Additionally, our ability to influence the development of customary law changed dramatically in 1994 when the Convention entered into force. As a non-Party, we no longer had a voice at the table when important decisions were being made on how to interpret and apply the provisions of the Convention. As a result, over the past 10 years, we have witnessed a resurgence of creeping jurisdiction around the world. Coastal States are increasingly exerting greater control over waters off their coasts and a growing number of States have started to challenge US military activities at sea, particularly in their 200 nautical mile (nm) EEZ.

For example, as I testified before the Senate Foreign Relations and Armed Services Committees, Malaysia has closed the strategic Strait of Malacca, an international strait, to ships carrying nuclear cargo. Chile and Argentina have similarly ordered ships carrying nuclear cargo to stay clear of their EEZs. These actions are inconsistent with the Convention and customary law, but will other nations attempt to follow suit and establish a new customary norm that prohibits

the transport of nuclear cargo? Will attempts be made to expand such a norm to include nuclear-powered ships?

China, India, North Korea, Iran, Pakistan, Brazil, Malaysia and others, have directly challenged US military operations in their EEZ as being inconsistent with the Law of the Sea Convention and customary international law. Again, the actions by those countries are inconsistent with the Convention and customary law, but will other nations follow suit and attempt to establish a new customary norm that prohibits military activities in the EEZ without coastal State consent?

It is extremely shortsighted to argue that, if the customary law system somehow breaks down, the United States, as the world's pre-eminent naval power, wouldn't have any trouble enforcing it. Clearly, our Navy and Air Force could engage in such an effort. However, enforcing our navigational rights against every coastal nation in the event the Convention and customary law systems collapse would be too costly, both politically and economically. Moreover, it would divert our forces from their primary missions, including the long-term global war on terrorism. Excessive coastal nation claims are the primary threat to our navigational freedoms. Those claims can spread like a contagious virus, as they did in the 20th Century. The added legal security we get from a binding treaty permits us to use our military forces and diminishing resources more efficiently and effectively by concentrating on their primary missions.

If we are going to successfully curtail this disturbing trend of creeping jurisdiction, we must reassert our leadership role in the development of maritime law and join the Convention now. The urgency of this issue is highlighted by the fact that under its terms, the Convention can be amended after this November. As a party, the US could prevent any attempt to erode our crucial and hard won navigational freedoms that are codified in the Convention.

Few treaties in U.S. history have undergone the level of scrutiny that the LOS Convention has undergone. Every aspect of the Convention was painstakingly reviewed and analyzed during its 9-year negotiation. Since 1982, it has been exhaustively considered, analyzed and interpreted by every relevant agency in the U.S. government. As you know, the Reagan administration gave it a long, careful review and decided not to sign it solely because of the flaws in Part XI concerning deep seabed mining. The Convention was again closely scrutinized from 1990 to 1994 as Part XI was being renegotiated to fix the problems identified by the Reagan Administration. I would note, in this regard, that the efforts to renegotiate Part XI commenced under the first Bush Administration. After the Part XI Agreement was successfully negotiated in 1994 to fix the problems identified by President Reagan, the Convention was again reviewed and analyzed when the Clinton Administration sent the Convention and the Part XI Implementing Agreement to the Senate for advice and consent. The Convention was again

extensively reviewed and analyzed in 2001 after 9/11, and again this year. Initial hearings on the Convention were held by the Senate Foreign Relations Committee in 1994, and again in 2003. Additionally, there have been hearings this year before the Senate Committee on Environment and Public Works and Committee on Armed Services, and this hearing today. Finally, the Convention has been the topic of debate and discussion at countless academic conferences hosted by numerous prestigious institutions such as Brookings as well as: Georgetown University, University of Virginia, Duke University, Center for Ocean Law and Policy, Law of the Sea Institute, Naval War College, and National Academy of Sciences.

There is now almost universal adherence to the LOS Convention, with 145 parties, including all of our major allies and important non-aligned nations. The Convention establishes a stable and predictable legal framework for uses of the oceans that will benefit our armed forces. As a matter of substance, all of his successors have agreed with President Reagan that the Convention sets forth the appropriate balance between the rights of coastal nations and the rights of maritime nations. The United States is both and will benefit two-fold by becoming a party. The Convention is good for America – good for our economy, good for our well-being and, most importantly, good for our national security. It is time that we

reassert our position as the pre-eminent maritime nation of the world and take our rightful place as a party to the Convention.

Mr. Chairman, thank you again for the privilege to appear before your committee. I'll be happy to answer any questions.